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Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*

Summary

In the present report, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence presents the key activities undertaken by him between July 2014 and June 2015.

The Special Rapporteur elaborates on the main elements of a framework for designing State policies regarding "guarantees of non-recurrence". Offering conceptual clarity to the term "guarantees of non-recurrence", the Special Rapporteur suggests structuring such policies around three main spheres of intervention. At the level of official State institutions, the report begins with a reminder of some basic conditions, including security and legal identity, and proceeds to offer a range of initiatives, including the ratification of relevant treaties; justice and security sector reforms; changes in security legislation; and constitutional reforms, incorporating the separation of powers principle, removing discriminatory provisions and incorporating a bill of rights. The Special Rapporteur then draws attention to two spheres of intervention, the potential of which has not been frequently examined as part of guarantees of non-recurrence, namely, civil society and the spheres of culture and personal dispositions. In these sections, the Special Rapporteur mentions the importance of legal empowerment and the creation of an enabling environment in order for civil society to discharge its crucial role. Finally, the Special Rapporteur emphasizes the preventive potential of education reform, arts and culture, and trauma counselling.

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In conclusion, the Special Rapporteur emphasizes that "guarantees of non-recurrence" should be considered not as a rhetorical device but as an object of policymaking. The Special Rapporteur highlights that, in order to develop an effective preventive State policy, interventions in all three areas are necessary.

The Special Rapporteur's set of general recommendations for truth commissions and archives is presented in an annex to the present report.

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I. Introduction

1. The present report is submitted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence pursuant to Human Rights Council resolution 27/3. In it, the Special Rapporteur presents the key activities undertaken from July 2014 to June 2015, and addresses the topic of establishing a policy on guarantees of non-recurrence in the aftermath of mass violations.

II. Activities of the Special Rapporteur

A. Country visits and regional consultations

2. The Special Rapporteur undertook a country visit to Burundi (see A/HRC/30/42/Add.1; A/HRC/30/CRP.1) and an advisory visit to Sri Lanka.[1] He thanks both Governments for their invitations and cooperation.

3. The Special Rapporteur is pleased to announce he will undertake a country visit to the United Kingdom of Great Britain and Northern Ireland in November 2015. A further invitation was extended by the Government of Côte d'Ivoire. Other pending visit requests concern Brazil, Cambodia, the Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Kenya, Nepal, Rwanda and Sri Lanka.

4. The Special Rapporteur will undertake a regional consultation on transitional justice for the Asia-Pacific region in December 2015. As with previous consultations, the results will form part of the study requested in paragraph 1 (f) of Human Rights Council resolution 18/7.

B. Communications and press releases

5. From July 2014 to June 2015, the Special Rapporteur sent communications to Chile, Egypt, Guatemala, Italy, Morocco, Nepal, Pakistan, the Philippines, Portugal, Serbia, Spain and the Russian Federation;[2] prepared an open letter to the United States of America; and issued press releases on Argentina, Bosnia and Herzegovina, Burundi, Colombia, Nepal, Spain and the United States.

C. Other activities

6. In August 2014, the Special Rapporteur participated as panellist in a national forum on victims, organized in Cali, Colombia, at the request of the peace negotiation representatives of the Government of Columbia and the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP).[3]

7. During the period in question, the Special Rapporteur presented his report (A/HRC/27/56) addressing the topic of prosecutorial strategies in the aftermath of mass atrocities and his visit reports on Spain and Uruguay (A/HRC/27/56/Add.1 and A/HRC/27/56/Add. 2, respectively). In addition, he was a panellist in the Human

[1] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E.
[2] See A/HRC/28/85, A/HRC/29/50 and A/HRC/30/27.
[3] See www.hchr.org.co/publico/pronunciamientos/ponencias/PDeGreiff_Cali_Agosto_2014.pdf.

Rights Council panel debate on history teaching and memorialization processes, and participated in side events on gender and transitional justice and experiences on the implementation of transitional justice measures. He met with representatives of Armenia, Cambodia, Colombia, Côte d'Ivoire, Guatemala, Japan, Nepal, the Netherlands, the Republic of Korea, Spain, Sweden, Switzerland, the United States and Uruguay, as well as several non-governmental organizations.

8. In September 2014, the Special Rapporteur, the International Committee of the Red Cross and the organization Swisspeace organized in Geneva an expert workshop entitled "Archives in the Context of the Right to Know".

9. Furthermore, in September 2014, the Special Rapporteur attended a regional conference in Guatemala on the role of the judiciary in the fight against impunity for international crimes.

10. In October, the Special Rapporteur, with the founding office of the Nuremberg Principles Academy, conducted an expert workshop on guarantees of non-recurrence, held in Nuremberg, Germany.

11. Also in October, he presented to the General Assembly his report (A/69/518) addressing reparations for victims in the aftermath of mass violations of human rights and of international humanitarian law.

12. In January 2015, the Special Rapporteur held meetings in Addis Ababa on the draft African Union Transitional Justice Framework, including with the African Union Commissioner for Political Affairs, the African Union Chairperson's Special Envoy on Women, Peace and Security, and donors agencies and non-governmental organizations.

13. In February 2015, the Special Rapporteur presented a keynote speech at the conference entitled "Truth Commissions and Peace Processes: International Experiences and Challenges for Colombia", organized by the Kofi Annan Foundation and the International Centre for Transitional Justice in Bogota.

III. Guarantees of non-recurrence as part of a comprehensive transitional justice strategy

14. In the present report, the Special Rapporteur addresses the topic of developing a State policy on guarantees of non-recurrence in the aftermath of mass violations, understood as part of a comprehensive transitional justice strategy. It is to be read in conjunction with the 2015 report of the Special Rapporteur, to be presented to the General Assembly at its seventieth session, in which the Special Rapporteur elaborates on the topic of transitional justice and security sector reform.

A. Legal foundation

15. International standards on guarantees of non-recurrence have grown significantly since 1993, when the term was first used in a United Nations report.[4] This is demonstrated, inter alia, by the explicit reference to "guarantees of non-repetition" in the International Convention for the Protection of All Persons from Enforced Disappearance.

[4] See E/CN.4/Sub.2/1993/8, paras. 47 and 48, and 55; and section IX, principle 11.

16. In 2004, the Human Rights Committee held that the purposes of the International Covenant on Civil and Political Rights "would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee ... to include ... the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question".[5]

17. The first jurisprudence by the Committee regarding right-to-life cases requiring States to "take steps to ensure that similar violations did not occur in the future" dates back to the 1980s.[6] The former Special Rapporteur, Theo van Boven, argued on that basis that "there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of similar violations and the issue of the follow-up given by the State party".[7]

18. The general commitment to adhere to a right involves making efforts to ensure that its violation ceases and is not repeated. The duty to prevent recurrence is hence closely linked to the obligation of cessation of an ongoing violation. On this basis, "guarantees serve a preventive function and may be described as a positive reinforcement of future performance".[8]

19. Regional human rights courts and human rights treaty bodies have, with increasing frequency, issued orders related to guaranteeing non-recurrence. For example, the Inter-American Court of Human Rights has interpreted its remedial powers broadly and ordered remedies directed not only at victims, but also at communities and towards society at large. Significant progress by the Court includes a practice of requiring States to take measures to preserve the victim's memory or making relevant parts of its ruling public for educational purposes.[9] On legislative reform, the Court held that laws that place civilians under military court jurisdiction are a violation of the American Convention on Human Rights; consequently, it ordered the State to change the legislation.[10] Such orders are not uncommon in Court decisions. As the Court argued in its landmark *Velásquez Rodríguez* decision, States are obliged "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".[11]

B. Conceptual issues

20. Despite the significant growth of the relevant international standards, the term "guarantees of non-recurrence" requires elaboration regarding the following conceptual questions:

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[5] See CCPR/C/21/Rev.1/Add.13, para. 17.

[6] See communications No. 88/1981, *Larrosa v. Uruguay*, Views adopted on 29 March 1983, para. 13; No. 124/1982, *Muteba v. Zaire*, decision on admissibility dated 25 March 1983, para. 13; and No. 176/1984, *Peñarrieta et al. v. Bolivia*, Views adopted on 2 November 1987, para. 18.

[7] E/CN.4/Sub.2/1993/8, para. 55.

[8] See Draft Articles on State Responsibility, article 30.

[9] See Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past* (Oxford University Press, 2008).

[10] Ibid. See also *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999, Inter-American Court of Human Rights, Ser. C, No. 52, para. 222.

[11] See *Velásquez Rodríguez v. Honduras*, Judgement of 29 July 1988, Inter-American Court of Human Rights, Ser. C, No. 4, para. 166.

(a) The "offer", as it is not clear what is meant by a "guarantee";

(b) The "object", as the reference in the foundational texts[12] to the non-recurrence of gross violation of human rights by States has widened to include the non-recurrence of "international crimes" committed by State and non-State actors, the non-recurrence of atrocities and even of the non-recurrence of violent conflict;[13]

(c) The "subject", or who the beneficiaries of the guarantees are supposed to be, i.e., the victims, a wider group of "potential" victims or society at large;

(d) The "duty bearers", i.e., those supposed to fulfil their obligation to provide said guarantees.

21. In the present report, the Special Rapporteur aims at contributing conceptual clarity about "guarantees of non-recurrence"; acknowledging the breadth of the field, yet giving it some structure, without being necessarily comprehensive; and highlighting areas that have not received appropriate attention.

22. Furthermore, the main interests underlying the report are practical, and aim to show that the topic can be concretely acted upon; demonstrate that it is a fit object of rational policymaking, including planning, budgeting and monitoring; and offer a general framework for designing an actionable non-recurrence policy.

23. Conceptually, there is a difference between guarantees of non-recurrence and the remaining three core elements of a comprehensive transitional justice approach, namely, truth, justice and reparation. While those three elements refer to measures, guarantees of non-recurrence is a function that can be satisfied by a broad variety of measures. The foundational texts already demonstrate this variety, pointing to, inter alia, reforming institutions, disbanding unofficial armed groups, repealing emergency legislation incompatible with basic rights, vetting the security forces and the judiciary, protecting human rights defenders and training security forces in human rights.

24. The core function of guarantees of non-recurrence is preventive in nature. It is one to which truth, justice and reparation are themselves supposed to contribute: criminal justice mainly through deterrence; truth commissions through disclosure, clarification and the formulation of recommendations with a preventive intent; and reparations by strengthening the hand of victims to claim redress for the past and future violations and to enforce their rights more assertively.

25. The preventive intent is the unifying thread in the foundational texts. Framing an indicative reply to the aforementioned conceptual questions, the "offer" of guarantees of non-recurrence relates to a combination of deliberate, diverse interventions that contribute to a reduction in the likelihood of recurring violations. The "object" is not the prevention of isolated violations, but of gross human rights violations and serious violations of international humanitarian law. Such violations presuppose systemic abuses of (State) power that have a specific pattern and rest on a degree of organizational set-up.

26. The present report is written on the understanding that the "subject" of the guarantees is the previously victimized society, seen at large, thus not limited to the

[12] E/CN.4/Sub.2/1997/20/Rev.1; E/CN.4/2004/88; General Assembly resolution 60/147; and E/CN.4/2005/102/Add.1.

[13] See S/2004/616.

direct or indirect victims.[14] Given the Special Rapporteur's interest in exploring the development of preventive policies, State institutions will be the main "duty bearers". Nonetheless, considering the diversity of the potential elements of a comprehensive policy, those bearers are ultimately manifold.

27. Guarantees of non-recurrence are a function that can be satisfied by diverse measures. Thus, there is no such thing as a general non-recurrence policy. An effective policy designed to prevent systemic violations will need to adjust form to function and choose the proper instruments.

C. Framing considerations

28. Three general considerations are relevant. First, transitional justice programmes have not taken into account sufficiently the significant differences between the post-authoritarian contexts, where the model of transitional justice originally took shape, and the situations of (post-)conflict and fragility in which it is now predominantly implemented. Two important differences relate to degrees of (State) institutionalization and the types of violations, abuses and harms requiring redress.

29. These differences play out as follows: criminal trials, truth commissions and reparations programmes all rest upon certain institutional preconditions that are not satisfied in all settings. Furthermore, those measures are effective instruments for redressing certain kinds of violations and not others. The transfer of the model from the post-authoritarian context to the (post-)conflict setting has taken place with virtually no functional analysis.

30. The same applies to guarantees of non-recurrence: the institutional context, its characteristics, capacities and history all matter, as do the cultural circumstances and individual dispositions. Preventing mass violations does not call for the same specific measures regardless of those factors. Similarly, the (risk of) prevalence of some (patterns of) violations should naturally shape a prevention policy for a given country.

31. In addition, transitional processes are dynamic. Therefore, besides allowing for functional adequacy between means and ends and suitability to context, the design of the policies to implement transitional justice elements should take into account fittingness to a certain stage in a process. Thus, what is necessary and feasible for prevention changes over time, not only as institutional characteristics change, but also as the horizon of possibilities shifts.

32. Furthermore, the sort of transformations that are called for in order to approximate anything resembling guarantees of non-recurrence following mass violations cannot be achieved through "institutional engineering" or institutional reforms alone. The challenge of achieving justice retrospectively and prospectively is not merely a technical one. Lasting societal transformations require interventions not only in the institutional sphere but also in the cultural sphere and at the level of personal, individual dispositions. While culture and "character" play a stabilizing function in social relations, and as such are by nature relatively immune to deliberate change, they are not immutable altogether. Hence, in the present report, the Special

[14] See Juan E. Méndez, "Accountability for Past Abuses", *Human Rights Quarterly*, Vol. 19, No. 2, p. 261 (May 1997).

Rapporteur pays attention to interventions in the cultural and the personal domains that have received comparatively less attention.

33. Economic conditions and their relation to non-recurrence with a view to meaningful transformation is a topic that does not receive sufficient focus. As argued in previous reports, transitional justice cannot be thought to exhaust the agenda of thorough political, social and economic transformation that is called for in the aftermath of mass violations.

34. Although the causes of violence or violations of rights cannot be reduced to inequality or poverty, singly or jointly, or to any straightforward combination of social indicators, it is well known that both inequality and poverty correlate robustly with violence and the violations of various rights, including civil and political, and economic, social and cultural.[15] Most of the violent conflicts in the world take place in countries that are or have been deeply afflicted by large inequalities, poverty, and often both.

35. There are forms of economic exclusion that, if entrenched over time, may be particularly detrimental to the enjoyment of rights. Persistent and durable inequalities, but also some of the inequalities associated with rapid but highly uneven economic growth, have been argued to be associated with both social discontent and increases in criminal activities, violence and civil conflict.[16]

36. The continuation in power of an abusive regime makes it impossible to guarantee that violations will not be repeated. In some of these contexts, lack of economic opportunities outside government-paid posts raises decisively the stakes of losing power. This motivates the entrenchment of abusive regimes, increasingly also observed through the subversion of democratic processes, and consequently undermines the possibility of offering effective guarantees of non-recurrence. These cases provide a compelling illustration of the economic and developmental dimension to prevention, which must no longer be ignored and should be more thoroughly analysed.

37. In the present report, the Special Rapporteur presents a range of interventions from easily actionable to more ambitious, demanding interventions. This is not a causal sequence. No intervention, large or small, on its own, in any of the three spheres, is likely to offer sufficiently strong guarantees. The multidimensional character of conflict and of rights violations needs to be matched by multidimensional responses. The Special Rapporteur also demonstrates that there is always something that can be done in order to diminish the likelihood of repeated violations. Therefore, neither cost nor complexity of interventions is a legitimate excuse for inaction.

[15] See A/HRC/29/31. See also World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, D.C., 2011).

[16] See P. Justino, *Shared Societies and Armed Conflict: Costs, Inequality and the Benefits of Peace*, Institute of Development Studies (London, 2012).

IV. Institutional interventions

A. Basic preconditions

1. Security for all

38. Much reflection about redressing rights violations simply makes assumptions about what is missing in the majority of the cases at hand, namely, functional State institutions. In their original intent, human rights instruments were designed to address — and in fact to redress and correct — abuses of State power. A great deal of abuses, however, today takes place in areas of limited governance and by non-State actors. Moreover, it should be highlighted that it is usually the most marginalized who bear the brunt of the violations; the better-off have always more exit options and can translate economic power into some degree of security. Non-recurrence policies need to pay attention to the provision of effective security for all in full compliance with all relevant rights-related standards including equality and fairness.

2. Legal identity

39. Proof of legal identity is crucial for the exercise of rights and for gaining access to State services. It is generally a precondition for, inter alia, participating in most administrative and judicial proceedings, including those related to the violation of fundamental rights; settling questions relating to civil status; voting or standing for election and being appointed to office; obtaining a nationality and a passport; gaining access to social security or other forms of State support; taking part in commercial transactions, including entering contracts; opening bank accounts; and acquiring a title to property.

40. International and regional human rights law recognize the right to legal identity[17] in time of peace and conflict. According to the United Nations Children's Fund (UNICEF), approximately one third of all children under five worldwide have never been registered.[18] Statelessness, which affects more than 10 million people, according to the Office of the United Nations High Commissioner for Refugees (UNHCR), compounds the problem.[19] Conflict negatively affects legal identity through: (a) the absence or weakening of State presence and services; (b) migration and displacement, often involving the loss of documents and the impossibility of obtaining new ones; (c) fear and intimidation, for example, children being relocated and forcibly conscripted; and (d) the deliberate destruction of registries, as has happened during conflicts at least in Guatemala, Peru, Bosnia and Herzegovina and Timor-Leste. In Cambodia, during the Khmer Rouge regime in the 1970s, all documents relevant to civil status were destroyed. In Sierra Leone, where thousands of children were abducted and forced to fight during the 10-year conflict, many had

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[17] See International Covenant on Civil and Political Rights, art. 24; Convention on the Rights of the Child, arts. 7 and 8; International Convention for the Protection of All Persons from Enforced Disappearance, art 25; African Charter, art. 6; and American Convention on Human Rights, arts. 3 and 18.

[18] See UNICEF, "Every Child's Birth Right: inequalities and trends in birth registration" (New York, 2013), available from www.unicef.org/media/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.

[19] See UNHCR, *2013 Statistical Yearbook* (Geneva, 2013), available from www.unhcr.org/54cf99f29.html.

no registration of their birth and lacked the means to trace their identity and identify their families or communities.[20]

41. Officially recognized identity, substantiated through birth certificates or identity documents, is a gateway for the realization of most fundamental rights. Legal identity is important for the purpose of having rights respected, for claiming them and for obtaining redress when they are violated. Addressing the challenges of legal registration in the aftermath of conflict or repression provides an opportunity to establish, restore or strengthen the foundations of a national registry that is compulsory, universal, permanent and continuous, which secures the confidentiality of personal data and is sensitive to cultural circumstances, including of minorities and religious or indigenous groups. By facilitating statistical data, legal registration can assist a Government to better plan, implement and monitor its service provision and efforts towards the realization of the rights of the individuals and development objectives. Addressing legal identity concerns in post-conflict or post-authoritarian contexts provides a way for transitional justice mechanisms to have an impact beyond their direct sphere of influence.

B. Ratification of treaties

42. While legal identity is a precondition for the exercise of rights, there are measures that can proactively promote rights, both retrospectively, by redressing their violation, and prospectively, by trying to prevent the violations. Some of these tools have received legal expression in international treaties. A basic step in the articulation of a non-recurrence policy, therefore, consists in the ratification of relevant treaties concerning gross human rights violations and serious violations of international humanitarian law.[21] States should avoid, or withdraw, any reservation that could raise doubts as to their compatibility with the object and purpose of the treaty.

43. Because no law is self-executing, ratification alone can at best be taken as a signalling device, which has the potential for misuse as "window dressing", in which case ratification can be followed by a worse human rights performance.[22] Nevertheless, ratification, exemplifying what has been called "the paradox of empty promises",[23] can lead to greater compliance if accompanied by various forms of advocacy.[24]

44. Except for pure "monist" legal systems, ratification can lead to greater compliance only if accompanied by the incorporation of treaty obligations into domestic legislation. In such systems, therefore, a basic element of a non-recurrence policy will require, in addition to ratification, a strategy of incorporation (and desirably of monitoring and enforcement).

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[20] Ibid.

[21] See key international instruments, available from www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx.

[22] See Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?", *Yale Law Journal*, Vol. 111, No. 8 (2002).

[23] See Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises", *American Journal of Sociology*, Vol. 110, No. 5 (2005).

[24] See Tomas Risse et al, *The Persistent Power of Human Rights* (Cambridge University Press, 2013).

C. Legal reforms

45. The incorporation of international legal obligations should at least cover the following basic issues: the typification of relevant crimes; statutes of limitations and retroactivity questions; and the introduction of reforms leading to de-incentivizing violations, including regarding anti-terrorism legislation.

1. Criminal types, statutes of limitation and retroactivity issues

46. The focus here is placed on the inclusion of measures that enable judicial and non-judicial remedies for redressing gross human rights violations and serious international humanitarian law violations.

47. The incorporation of criminal types (offences) on the basis of international law has the advantage not only of accurately reflecting international obligations, but also of solving two problems that have increasingly become an excuse for inaction in the face of systematic or widespread violations, namely, prescription and retroactivity issues.

48. Common crimes in domestic jurisdictions are generally accompanied by prescription regimes. The reasons to make "atrocity crimes" imprescriptible are, first, that atrocity crimes raise particular investigatory and prosecutorial challenges that usually cannot be met on the same schedule as common crimes; and second, that imprescriptibility helps signal that such crimes constitute an affront to humanity, communicating that, in theory, neither space nor time will provide escape from responsibility.

49. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[25] which also covers crimes of genocide and those associated with apartheid, states that the relevant crimes are imprescriptible "irrespective of the date of their commission". International jurisprudence has frequently reiterated that the Convention does not create new rights or obligations, but that it is declarative in nature, and that the principle of imprescriptibility of war crimes, crimes against humanity and genocide is a matter of *jus cogens*.[26]

50. This helps to address claims regarding the retroactive application of criminal law or violations of the principle of legality, in particular, of the principle that no one should be punished for an act that was not proscribed by a law in force at the time of commission.[27] Jurisprudence from various courts shows the ways in which different countries have confronted some of these challenges. Some countries have carried out judicial processes for gross human rights violations using criminal types current in their penal codes at the time of their commission, but, judging the offences to be crimes against humanity in accordance with *jus cogens*, they have attributed to those violations some of the characteristics and consequences of international crimes, such

[25] General assembly resolution 2391 (XXIII), 1968.

[26] See, for example, *The Prosecutor v. Klaus Barbie* (Supreme Court, France); *Kolk and Kislyiy v. Estonia* (European Court of Human Rights); *Priebke*, and *Arancibia Clavel* (Supreme Court, Argentina); *Molco* (Supreme Court, Chile); *Barrios Altos*, and *Gelman* (Inter-American Court of Human Rights).

[27] See Universal Declaration of Human Rights, art. 11 (2); International Covenant on Civil and Political Rights, art. 15; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7; American Convention on Human Rights, art. 9.

as imprescriptibility.[28] Other courts have carried out judicial processes using criminal types that may have not been present in national codes when the acts were committed, arguing that this does not violate the principle of legality if international law already declared the acts in question to be illegal when they were committed.[29] Indeed, domestic and international courts have found ways to guarantee simultaneously respect to the principle of legality as well as due process and fair trial standards for the defendants, and to the rights of victims to see the perpetrators of violations brought to justice.[30]

2. Emergency, security and counter-terrorism legislation

51. Another crucial legislative reform that is not particularly onerous in terms of expenses or complexity is to ensure that emergency, anti-terrorism or other security-related legislation is fully compatible with human rights standards, so that it does not incentivize violations of rights. Authoritarian regimes, regimes mired in conflict and, for years now, States involved in so-called "wars on terrorism" almost invariably adopt legislation that goes well beyond the objective security needs that purportedly motivate it.[31] Such laws have been seriously misused to justify gross human rights violations. For example, in addition to allowing for prolonged periods of "preventive" detention, constraining access to defence lawyers, the absence of the review of the legality of detention by a court, among other limitations of rights, these laws either directly or indirectly promote, even instigate, the violation of rights. This is the case, for example, with the singly objectionable, jointly pernicious, removal of bars on the use of evidence that may have been obtained illegally, frequently by coercion, and the weakening of the safeguards under which "confessions" can be given by detainees.

D. Judicial reforms

52. Given the importance of an independent and effective judiciary in securing rights — but also of acknowledging the dubious role some judiciaries have played in pre-transitional periods in some countries — it is somewhat surprising that judicial reform has not played a more prominent role in discussions about guarantees of non-recurrence. This is in spite of recommendations made by many truth commissions in relation to judicial reform and the fact that many transitional countries have reformed their justice systems.[32] This serves as a good illustration of the lack of focus and strategy in discussions about guarantees of non-recurrence, and of the disconnect between transitional justice and other policy interventions with which it coexists but rarely interacts.

53. In the aftermath of mass violations, committed sometimes with the collaboration of the judiciary, or in any case having shown itself an insufficient bulwark against the violations, there are three important issues that should be tackled in order to help prevent future violations: (a) screening judicial personnel; (b)

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[28] See *Arancibia Clavel* and *Simón* (Supreme Court, Argentina); and *Fujimori* (Specialized Criminal Law Chamber, Peru).

[29] See Special Tribunal for Lebanon, Appeals Chamber, *STL-11-01/I*, paras.132 and 133; *Pérez García* (Colombia).

[30] See *Scilingo* and *Pinochet* (National High Criminal Court, Spain); *Gelman*.

[31] See A/HRC/16/51/Add.2, and A/HRC/25/59/Add.2.

[32] See Linn A. Hammergren, *Justice Reform and Development. Rethinking Donor Assistance to Developing and Transitional Countries* (Routledge, Oxford, 2014).

strengthening judicial independence; and (c) strengthening judicial competencies in areas specifically important for preventive purposes.

54. If judiciaries virtually everywhere can at times be subjects of mistrust, in contexts of past mass violations, some are so tainted with complicity that it is virtually impossible for them to gain trust without a major vetting or screening of their personnel, from the top down. Particularly in places in which higher court judges have responsibilities for the administration of courts, including case allotment, judicial career and disciplinary procedures, as well as a voice in decisions about judicial reforms, a judiciary entirely appointed by a predecessor regime, seen as complicit in past mass violation, will stand in need of major personnel review.

55. The vetting of judges poses particular challenges because procedures need to respect the separation of powers, judicial autonomy, due process guarantees and, if it exists, the general principle of the irremovability of judges, which may only be transgressed in exceptional cases.[33] Furthermore, even a judiciary dependent on the executive power is, in most cases, far from being a powerless branch. Some countries under quite difficult circumstances have managed to vet the judiciary, showing respect for the relevant principles, including due process. The latest country to embark in such a project has been Kenya.[34]

56. Continuing judicial training should include information about the role of the judiciary in past violations; the capacity to self-criticize needs to be exemplified by the judiciary above all branches of government.

57. Changes in personnel are insufficient to turn ineffective or complicit judiciaries into trustworthy arbiters and reliable guarantors of rights. Prospectively, structural changes are necessary, including means to strengthen judicial independence, as many truth commissions have recommended.[35] Without such reforms, the likelihood that courts will (at least) dare to check executive powers will not increase significantly, and will be entirely dependent on the virtue of particular individuals.

58. There is no single reform that can guarantee that judges will act independently. However, opportunities for individuals to exercise judgement independently are increased if they are offered certain protections, including recruitment on the basis of merit and objective criteria; security of tenure; adequate terms of service, for example, remuneration and predictable conditions of retirement; and transparent, reliable disciplinary processes, for example, fair procedures, proportionate sanctions, promotions, dismissals and transfers, so that the fears of losing their jobs, not being promoted or being arbitrarily transferred to an undesirable location do not influence their opinions.

59. Guaranteeing the physical safety of judges is a decisive condition of the exercise of independent judgement.

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[33] See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 30.

[34] For an overview of the vetting structures and procedures, see International Commission of Jurists, Kenya Section, available from www.icj-kenya.org/index.php/resources/publications/papers-dl.

[35] For El Salvador, S/25500 (1993), pp. 172ff. Guatemala see www.derechoshumanos.net/lesahumanidad/informes/guatemala/informeCEH.htm, vol. 3, ch.16; for Chile, see www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf; and for Sierra Leone, see www.sierraleonetrc.org/index.php/view-the-final-report/table-of-contents, vol. 2, chap. 3, paras. 39, 104-106 and 132-163.

60. In addition to guaranteeing the individual independence of judges, it is also important to strengthen the institutional independence of the judiciary. This can be accomplished by enshrining the separation of powers in constitutional texts and/or practices; using methods for appointing judges and magistrates that signal a valuation of competence and independence rather than political affiliation; endowing the judiciary with sufficient resources and providing it with budgetary and administrative autonomy; ensuring that cases are assigned on the basis of objective criteria; and respecting and enforcing the decisions of courts, even when they are contrary to the interests of the executive or its supporters, including regarding significant issues for the Government, such as electoral questions.

61. For the adjudication of cases involving mass violations, judicial systems need to build and further develop specialized capacities regarding the widespread and systemic nature of violations and the identification of respective patterns and nodes in networks of systemic crimes, as they require a change in investigative, prosecutorial and adjudication techniques and practices.[36] In many jurisdictions, familiarity with international human rights and humanitarian law is weak to non-existent. Familiarity with the peculiarities of "structure crimes",[37] such as genocide, crimes against humanity and war crimes, which rest upon a network of actors, is even scarcer. Dismantling networks of such criminality, some of which are ensconced in State institutions, i.e. in torture cases, through the implementation of an appropriate strategy ably pursued by prosecutors and competently adjudicated by judges is one of the most effective contributions a judicial system can make to preventing the recurrence of violations. Such capacities are sometimes best expressed and built in the establishment of specialized (pre-)investigatory offices, courts or tribunals.

E. Constitutional reform

62. The following is a set of constitutional issues, presented in a rough ascending order of complexity, that transitioning countries could make part of their non-recurrence policy.

1. Removing discriminatory provisions, introducing mechanisms of inclusion

63. The removal from constitutions and other laws or by-laws of any provisions that may fuel discrimination, a well-known source of social strife, is likely to contribute to the prevention of violations. Several truth commissions and peace agreements have made recommendations to this effect. For instance, the Sierra Leonean Truth and Reconciliation Commission recommended removing racist and sexist provisions governing citizenship, arguing that citizenship should be acquired by birth, descent or naturalization. In Morocco, the *Instance équité et réconciliation* argued for a constitutional prohibition on all forms of internationally prohibited discrimination and any incitation to racism, hatred or violence. The Arusha Peace and Reconciliation Accord (2000), which aimed at settling the conflict in Burundi, banned all political or other associations that advocated ethnic, religious or gender discrimination, and laid the basis for the consociational power-sharing agreement.

[36] See A/HRC/27/56, paras. 88-91.
[37] Ibid., para. 71.

which the 2005 Constitution set in place, and on which peace in Burundi still hinges.[38]

64. Truth commissions and peace agreements have advocated for introducing mechanisms of inclusion into constitutional texts. The Guatemalan Peace Accord, for example, emphasized the need to define the country as multi-ethnic, multicultural, and multilingual at the constitutional level. The Guatemalan Commission on Historical Clarification elaborated recommendations on inclusion and the protection of indigenous rights, calling for modes of governance that enable individual and collective rights of the indigenous population and encourage their social and political participation.

2. Incorporating a bill of rights

65. A good part of the effectiveness of bills of rights depends on the strength of the courts that interpret them and on how deeply other State powers feel bound by courts' decisions. However, introducing a bill of rights that publically enumerates the most fundamental rights a country seeks to safeguard is a powerful way of drawing a line between an abusive past and a different future, especially in the aftermath of mass violations. The design of a bill of rights and enshrining the basic principles of governance signals to institutions and individuals where minimum standards of acceptable behaviour lie. Bills of rights are a sort of a "pre-commitment" strategy that works on the basis of publicity and takes some issues out of the give-and-take of political expediency.[39]

66. In many countries with past mass violations, minorities were predominantly targeted. Articulating clear and enforceable guarantees for minorities in bills of rights may offer some protection and de-incentivize both attacks on them and the taking by them of preemptive action in ways that are characteristic of "security dilemmas".

67. Where Governments have a history of committing or condoning human rights violations, a bill of rights enables courts to identify legislation and governmental practices that have the potential to lead to recurrence of violations before they take place.

3. Security sector reform

68. Crucial elements in the area of security sector reform aiming at the prevention of violations in the future pertain to: (a) defining the different roles of the police, the military and the intelligence services; (b) strengthening civilian control over the armed forces; (c) the elimination of military "prerogatives"; and (d) the vetting of the security forces. In the light of the complexity of these areas, the Special Rapporteur has dedicated a separate report to these reform undertakings.[40]

4. Separation of powers

69. Abuses of power by security forces and lack of judicial independence are often manifestations of the same phenomenon, namely, a bloated and unrestrained executive power uninterested in accountability. Following mass violations, some

[38] See A/HRC/30/42/Add.1.

[39] See Stephen Holmes, "Precommitment and the paradox of democracy", in *Constitutionalism and Democracy* (Cambridge University Press, 1993).

[40] Report to be presented to the General Assembly at its seventieth session.

countries reconsider issues such as the separation of powers and endeavour to limit executive powers. The 2010 Constitution of Kenya, for example, curbs some of the powers given to the President by the 1963 Constitution and successive amendments, which had increased the powers of the President while weakening the legislature and the judiciary. Most recently, the authorities in Sri Lanka presented to parliament the XIX Amendment, ending the era of the so-called "executive presidency", devolving to parliament some of the powers that the office of the President had accumulated over time to the detriment of the remaining State powers.

5. Limiting the scope of military justice

70. Militaries in most countries operate their own courts because the military relies on distinct regulations, laws and codes of conduct, and the enforcement of those codes, including disciplinary procedures, requires special mechanisms. International law, however, is clear that the jurisdiction of military courts is restricted to trying members of the military for military offenses, to the exclusion of human rights violations and serious violations of international humanitarian law.[41] Trying civilians in military courts or trying members of the military for crimes other than military crimes contravenes international law. Circumventing this key principle is one of the most prevalent ways of shielding violations committed by the military from accountability.

6. Establishing a constitutional court

71. Many transitioning countries, including virtually all the countries in the "third wave" of democratization,[42] have introduced a separate constitutional court, largely following the lead of Germany after the Second World War.[43] The establishment of such courts distinguishes the adjudication of routine, ordinary matters from crucial decisions on fundamental rights. This distinction provides an elegant way out of a dilemma faced by countries that do not trust judges appointed by a predecessor regime to be the last arbiters of the most fundamental rights-related questions, but that cannot afford to vet the judiciary.

72. There is no court, however, that can be entirely responsible for the protection of rights if other branches of power are determined to commit violations, or if non-State actors are determined to commit abuses. Similarly, no court, on its own, can sustain the rule of law in the face of attacks from other powers or indifference from citizens.[44] Membership in constitutional courts can be manipulated, judges coerced[45] or corrupted, and new ways of subverting legal order, which constitutional courts were not designed to counter, have emerged.[46]

73. Notably, for a constitutional court to be effective in protecting individuals' rights and preventing violations, it needs to be vested with an individual complaints

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[41] See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 29.

[42] See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1993).

[43] See Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015).

[44] See Bojan Bugaric, "A crisis of constitutional democracy in post-Communist Europe: 'Lands in-between' democracy and authoritarianism", *International Journal of Constitutional Law*, vol. 13, Iss. 1, pp. 219-245 (2015).

[45] See, for example, the recent allegations against one member of the Burundi Constitutional Court.

[46] See David Landau, "Abusive Constitutionalism", *UC David Law Review* (2013).

procedure, whereby an individual can challenge the infringement of his or her rights by any public act or omission.

7. Adopting a new constitution

74. Many countries are tempted to adopt a new constitution immediately after a transition. Some countries have succeeded in such an effort, including Spain in 1978 and, more recently, Kenya in 2010 and Tunisia in 2014, in a display of maturity and self-restraint on the part of Assembly members that did the country proud. There can hardly be a more powerful way to mark a line between the present and the past and to introduce guarantees and protections that were missing or ineffective before. Provided the country can complete the constitution-making exercise and that the new provisions are in fact observed, a new constitution enshrining a bill of rights and principles of governance is likely to be the central part of a non-recurrence policy.

75. However, constitutions are, regretfully, more often breached than observed. It might be that engaging in the far-reaching "existential" questions characteristic of constitutional debates proves to be a distraction in the early days of a transition, in a context in which State institutions might be required to urgently establish their capacity to meet more immediate needs. The first phase of a transition might not be the most conducive context for guaranteeing that the constitution will indeed be inclusive enough; it may be that political actors are insufficiently representative or that, in the absence of previous opportunities in countries lacking the required political traditions, actors at the table on the cusp of the transition are insufficiently versed in the complicated type of judgement that is called for if a sufficiently inclusive, sustainable constitution is to be articulated. Some of these factors might invite participants in constitutional debates to adopt a zero-sum attitude thinking that this is their (only) chance. All of these elements put obstacles in the process expected to produce a foundation that is good for all and for a long time.

76. Therefore, it may be advisable for countries to expand their repertoire of options for constitutional reform to include, for instance, the adoption of transitional or interim constitutional arrangements, as South Africa did, or incremental processes of constitutional renewal, as in Hungary and Poland after 1989.[47] More gradual processes of constitution-making are likely to lower the stakes for all stakeholders. This might open the possibility of achieving a greater degree of consensus over issues of critical importance.

V. Societal interventions

77. Prevention is not merely a matter of making changes in texts; prevention calls for changes in practice. Hence, legal reforms need to be accompanied by initiatives that can change "factor endowments", including available resources and, importantly, human capacity.

78. Most discussions of guarantees of non-recurrence have focused on the reform of official State institutions. However, in contexts of past mass violations, State institutions are often weak, inefficient and/or corrupt. Even if they are honest and relatively competent, they may have very limited reach, as in some countries the majority of conflicts are settled through informal mechanisms.

[47] See Vicki C. Jackson, "What's in a Name? Reflections on Timing, Naming and Constitution-Making", *William and Mary Law Review*, vol. 49, iss. 4 (2008).

79. The contribution of civil society organizations to transitional processes has been analysed is various ways, including regarding their advocacy function, their crucial role in collecting and preserving evidence, their monitoring functions and their reconciliation initiatives. All of these are crucial. However, in the present report, the Special Rapporteur concentrates on a more prevention-specific argument. He presents a series of initiatives that may enhance the preventive potential of civil society, ordered by degree of ambitiousness and complexity, showing how this potential, in many ways, is a manifestation of a "power of aggregation" that counteracts the "disarticulating power" of terror and that works by lowering the costs of raising claims.

A. Ceasing attacks and threats and removing obstacles

80. One of the simplest ways of enabling civil society to contribute to preventive work is simply to refrain from persecuting, intimidating and harassing civil society representatives, including human rights defenders.[48]

81. Another step is to remove many of the legal and practical barriers that have been placed on civil society with increased frequency in the recent past. According to one report, "between 2004 and 2010, more than 50 countries considered or enacted measures restricting civil society. Since 2012, more than 90 laws constraining the freedoms of association or assembly have been proposed or enacted."[49] These laws introduce obstacles of various types, such as barriers to operational activity, free speech and advocacy, contact and communication, peaceful assembly and access to funding.

82. Such strong governmental interest in hampering the work of civil society confirms yet again the importance of the latter. This consolation, however, does not make up for the different kinds of risks and privations that these obstacles generate, including violations of the right to physical integrity and the weakening of monitoring and advocacy capacities to prevent violations.

B. Legal empowerment

83. A more proactive way of strengthening civil society is to establish programmes targeted at the community level, focusing on those who have traditionally been excluded from the protection of the law, particularly women, with the specific aim of facilitating the use of the law, the legal system and legal services to advance their own rights, promote government accountability and resolve local disputes.

84. Legal empowerment can contribute to restoring the sense of agency of control over one's life that mass violations erode. These initiatives have also acted as a catalyst for social organizations and led to the enhanced ability, confidence and willingness of individuals and communities to participate in sociopolitical processes, including transitional justice mechanisms. This empowerment typically also brings with it a more assertive attitude of civil society actors to prevent violations in the future by enforcing their rights more confidently.

[48] See A/HRC/25/55.

[49] See Douglas Rutzen, "Aid barriers and the rise of philanthropic protectionism", *International Journal of Not-for-Profit Law*, vol. 17, no. 1, p. 7 (March 2015).

C. Creating enabling environments

85. In the present report, the Special Rapporteur encourages further reflection and study on the ways in which the strengthening of civil society can contribute to prevention. In earlier reports, observations were made about the fact that, without civil society participation, little progress would have been made in the domains of truth, justice and reparations. It is overwhelmingly thanks to the unrelenting advocacy of civil society organizations that accountability remains on the political agenda in countries with past mass violations. It is difficult to think of the efforts of Argentina to achieve justice without the contribution of the organizations Madres de la Plaza de Mayo and the centre for legal and social studies (CELS); those of Chile without the contribution of the Vicaría de la Solidaridad; or those of Guatemala without the persistence of the centre for human rights legal action (CALDH), to name only a few examples.

86. Because "civil society" should not be reduced to "non-governmental organizations", it is important to recall that, in all transitional processes, a variety of stakeholders, including trade unions and religious organizations, have made essential contributions. To illustrate, although the role of the Catholic Church during the dictatorships in Argentina and Spain and during the genocide in Rwanda has been questioned, its contributions to the search for accountability in Chile, Uruguay and to this day in Burundi are notable. Similarly, trade unions have made crucial contributions to many transitional processes, including in South Africa, Poland and, recently, in Tunisia.

87. Because most transitional processes have been "liberalizing" and therefore, over time, both trade union and church affiliations decline, the contribution of these groups tends to be overlooked. In the present report, the Special Rapporteur emphasizes the significance of their contribution not only for the sake of historical accuracy, but also because it gives an important indication about the type of civil society that we should aim at if we are interested in prevention.

88. Authoritarianism has not disappeared as a threat to human rights, and other threats have been added. Despite significant differences among them, systematic threats to rights share a common element: violence or threats of violence undermine civic trust, a phenomenon that creates a negative feedback loop and becomes both a condition and a consequence of the continuation of violence.

89. Hence the importance of strengthening civil society. In past reports, more concerned with issues of redress, the point to emphasize was that a strong civil society diminishes the costs and risks of raising claims, both for individuals and groups. In the context of a discussion about prevention, the point to emphasize is that in a strong civil society, in which individuals and groups are empowered to exercise their rights, the violation of rights is less likely.

90. Because civil society cannot be reduced to formal institutions, it would be a mistake to conceive the project of strengthening civil society on the model of an institutional reform process. Civil society by its very nature is not part of the State and therefore does not respond to State initiatives as if it were.

91. The strengthening and enhancing of the preventive potential of civil society are likely to come from such contributing factors as (a) the active promotion of the fundamental freedoms of expression and opinion, of peaceful assembly and association and of religion; (b) the establishment of an education system that provides opportunities to develop not just marketable skills but critical thinking; and (c) the preservation of traditions of openness, transparency and consultation, more

than from the mere removal of obstacles to the operation of non-governmental organizations.

VI. Interventions in the cultural and the individual spheres

92. In addition to interventions in the domains of official State institutions and in civil society, those in the domain of culture and individual spheres are required for long-lasting transformations, including non-recurrence. Culture and personality structures are, generally speaking, sources of stability and continuity in social relations, hence, neither one is open to direct and immediate change by legal fiat. However, this does not imply that they are immune to any change.

A. Education

93. In transitional contexts, education has the potential to act as a powerful tool for non-recurrence. Because of its formative potential, education can contribute to shaping new norms, mediating between contending narratives of the past and nurturing a culture of dialogue and democratic citizenship across generations. A transitional justice approach to education can greatly contribute to contextualizing the aims of educational reform after conflict and/or repression, with an eye to strengthening its potential for preventing the recurrence of violations, for example, by identifying the patterns that fuelled conflict, especially in relation to exclusionary and authoritarian practices in school systems.[50]

94. Of significant relevance is the teaching of history: if approached as a system of research rather than a mechanism for simply preserving and remembering data, it can train citizens in habits of analysis and critical reasoning.[51] In transitional contexts, historical facts are often manipulated to serve political and ideological aims through the propagation of one-sided narratives that leave no room for alternative perspectives. Different groups in society, particularly in ethnically divided ones, may learn different versions of a shared history that clash significantly with each other.[52] Similarly, the suppression of historical events, as practised in some contexts, reinforces the social identities of those who fought against each other.[53] Such practices risk perpetuating divisions and conflicts rather than preventing their recurrence.

B. Arts and culture

95. Cultural interventions, such as museums, exhibitions, monuments and theatre performances, have the capacity to affect not only victims but also the population at large.[54] In addition to the capacity to engage empathy, there are artistic and cultural interventions that are ideally suited to "make visible" both victims and the effects of

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[50] See Clara Ramírez Barat and Roger Duthie, *Education and Transitional Justice. Opportunities and Challenges for Peace Building* (International Centre for Transitional Justice and UNICEF, forthcoming).

[51] See A/HRC/27/56/Add.1, para. 34.

[52] See A/68/296.

[53] See Harvey M. Weinstein et al., "School voices: challenges facing education systems after identity-based conflicts", *Education, Citizenship and Social Justice*, vol. 2 no. 1, p. 66 (March 2007).

[54] See A/HRC/25/49.

victimization, to account for the very complex ways in which violations affect the lives of individuals and of communities, especially over time. Furthermore, some artistic media provide space for victims to articulate their experiences and even, emphasizing the interventions' enabling potential, to try out new identities, including the identity of a rights claimant.

C. Archives

96. Archives containing records of mass violations can contribute to prevention. Access to well-preserved and protected archives is an educational tool against denial and revisionism, ensuring that future generations have access to primary sources, which is of direct relevance to history teaching. One notable example in this regard are the Stasi files opened up by Germany after 1989. Opening files contributes directly to the process of societal reform.

97. However, there is a lack of consistency in the disposition of archives of transitional justice mechanisms, including truth commissions.[55] To address this gap, as a first step and as a result of a series of consultations with experts, the Special Rapporteur developed a set of general recommendations that builds on the right to know. This set of general recommendations (see annex) is meant to provide guidance for truth commissions and other relevant stakeholders in their future archival work.

D. Trauma counselling and psychosocial support

98. Psychosocial support or trauma counselling has been rather marginally identified as a component of a comprehensive strategy of non-recurrence. Gross violations are likely to lead to health problems,[56] implying troubles for individuals and society, which call for adjustments on a more fundamental psychological level. Challenges may include identity problems for individuals and society, which hamper the transformation of societies. Moreover, unaddressed specific traumatic events may lock countries in repeated cycles of violence.

99. Post-authoritarian and/or post-conflict settings face low levels of trust both vertically — between the State and its people — and horizontally — between individuals and between communities. However, trust is the foundation for the development of a rule of law culture, an environment that fosters reconciliation and a necessary precondition for effective communication between the victims and the authorities, as well as within society.

100. Where structural abuse or recurrent patterns of violence and unresolved trauma intersect, high levels of conflict and further violence are likely to develop. Furthermore, amid high levels of inequality, poverty and unemployment, where people's sense of dignity and self-worth are severely compromised on a daily basis, violent behaviour can become a simple means of taking back the control people are denied in their life.

101. Trauma counselling can be used to overcome and transform victim/perpetrator identities, as an important step towards reaching a conclusion. For the victim, this

[55] Ibid.

[56] For example, for Peru, see Lisa J. Laplante, "Linking Peacebuilding and health in post-conflict settings", available from www.frient.de/publikationen/dokumente/library/linking-peacebuilding-and-health-in-post-conflict-settings.html

can mean once more taking part fully in society; for the perpetrator, it can mean acknowledging and assuming responsibility. This transformation can help to avoid cycles whereby "victims become perpetrators", which perpetuate cycles of mass violations.[57]

102. While arguing for the anchoring of trauma counselling as a crucial element of a State policy aimed at guaranteeing non-recurrence, the Special Rapporteur warns against using psychosocial support to "water down" the importance of institutional reform. Instead, trauma counselling and civil society efforts should be considered as a "trigger-down mechanism" to ensure that institutional reform becomes truly effective at the individual level.

VII. Observations and recommendations

103. **The Special Rapporteur calls for more focused attention to the challenges arising in areas of weak governance for the effective satisfaction of rights and in particular to the challenges for protecting the rights of marginalized groups and individuals. Significantly more work needs to be done normatively and practically in order to protect the rights of individuals in such situations, including civilians trapped in the cross-fire of a conflict.**

Institutional level

104. **The Special Rapporteur calls upon States to take the necessary measures, in the aftermath of conflict and/or repression, to enable the registration of births and give access to all to gain or regain their legal identity; and to increase access to registration mechanisms, including through mobile registration units, accessible at the local and community levels, with simplified procedures that are reflective of the circumstances people face, for instance after displacement and the fragmentation of families. Measures need to be taken to ensure access for all, without discrimination, to a fully functional civil registration system that is universal, compulsory, permanent, continuous and cost-free, that ensures the confidentiality of personal data and is culturally sensitive, especially in relation to religious or cultural circumstances regarding minorities and indigenous groups.**

105. **He also calls upon States to adopt a non-recurrence policy that should include the ratification of relevant treaties, avoiding or withdrawing reservations that may defeat the purpose of the treaty. Ratification should be followed by a strategy for incorporating the provisions effectively into domestic law and their implementation. States should consider prioritizing the ratification of targeted treaties that pertain to gross human rights violations and serious violations of international humanitarian law, including torture, sexual and gender-based violence, extrajudicial executions, arbitrary detentions, enforced disappearances, institutionalized discrimination, forced displacement and exile, and crimes amounting to crimes against humanity, war crimes and**

[57] See S. Servaes and N. Birtsch, "Engaging with victims and perpetrators in transitional justice and peace building processes", workshop report published by Working Group on Development and Peace (FriEnt) and the Centre for Peacebuilding (KOFF) (October 2008). Available from www.frient.de/nc/en/publications-service/documents/library/engaging-with-victims-and-perpetrators-in-transitional-justice-and-peace-building-processes.html.

genocide. The Special Rapporteur urges all States to ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

106. States should promote reforms to ensure full compliance of emergency, security or anti-terrorism legislation with international human rights standards. Reforms should include explicit reference to non-derogable rights and enshrine elements for suitability, necessity and proportionality tests. Legislation must be in conformity with international standards, in particular the principle of legality, due process and fair trial. Furthermore, the criminalization of terrorist activity must be formulated in explicit and precise terms that enable individuals to regulate their behaviour, and the definitions of terrorist crimes should be confined exclusively to activities that entail or are directly related to the use of deadly or serious violence against civilians.

107. States should also consider methods of vetting judicial personnel that are compatible with the separation of powers, the independence of the judiciary and due-process guarantees. A judiciary that is not trusted by citizens either for reasons of complicity or ineffectiveness will find it impossible to fulfil its corrective and preventive roles. Since self-reflection about the judiciary's own role in violations is both trust-inducing and potentially preventive, the training of judicial personnel, and judicial reform in itself, should address the judiciary's role in past violations.

108. The Special Rapporteur calls upon States to include in their policies initiatives geared towards strengthening internal (individual) and external (institutional) judicial independence. He urges them to ensure that their judicial systems comply with relevant standards, including the Basic Principles on the Independence of the Judiciary. Judiciaries can crucially help to prevent violations by checking executive powers and by adjudicating conflicts impartially and independently.

109. He also calls upon States to endow their judiciaries with specialized competencies required to address mass atrocities strategically to dismantle networks of criminality. Implementing such strategies is one of the most significant contributions judiciaries can make to the prevention of violations. Similarly, he urges them to acquire competencies in the detection and prevention of other gross violations, which are routine in many places, including torture. While specialized judicial capacities are sometimes best expressed through the creation of specialized entities, no special jurisdiction — military or not — should weaken the power to guarantee and enforce basic rights.

110. States should consider, in transitional contexts, constitutional amendments or reforms to lay down a catalogue of rights and structures of governance as the foundation of the "new" State. This is possible through an incremental, interim or fully fledged constitutional drafting process. Enshrining the principles of the separation of powers, the independence of the judiciary, the non-partisan role of the security forces and a bill of rights is indicative of a new beginning. Special attention should be paid to providing for oversight, accountability and strong human rights protection mechanisms, including through the establishment of a constitutional court or chamber with an individual complaints procedure.

111. The jurisdiction of military tribunals should be limited solely to military personnel charged exclusively with military offences, to the exclusion of human rights violations and serious violations of international humanitarian law.

Civil Society

112. The Special Rapporteur calls upon States to prevent any persecution, attacks, threats, intimidation and harassment of civil society representatives. States should ensure protection mechanisms for civil society at risk, including early warning systems, physical protection measures, as well as accountability and prompt and impartial investigations in cases of violations. This requires clear and decisive messages from the highest authorities on zero-tolerance policy for such attacks and intimidation against civil society actors and on public recognition of their essential role in building just, inclusive and tolerant democracies.

113. He also calls upon States to withdraw or reform provisions that impose an excessive burden or disproportional heavy bureaucratic and costly procedures, which severely hamper civil society participation. This includes (a) amending registration mechanisms thereby excluding the possibility to deny registration on vague grounds; (b) reforming excessive procedural requirements; (c) withdrawing prior-authorization requirements, allowing spontaneous peaceful assembly and, if prior-notification mechanisms exist, their rationale should be grounded by ensuring the exercise of the right to peaceful assembly, protection of public safety and order, and the rights and freedoms of others; (d) providing for precise regulations defining illegal activities; (e) preventing arbitrary interpretation of regulatory provisions; (f) reforming legislation that prevents organizations from receiving support from certain donors, including foreign funding; (g) reforming legislation that imposes undue restrictions on freedom of expression and criminalizes dissenting and critical opinions; (h) preventing arbitrary or unlawful surveillance; (i) ensuring effective access to encryption and anonymity tools in online communications; and (j) protecting the confidentiality of sources.

114. States should create the economic, political, legal, social and cultural conditions that actively support the ability and capacity of persons, individually or in association, to engage in social and civil activities, promoting the principles of participation, non-discrimination, dignity, transparency and accountability. Key conditions include: (a) a conducive political and public environment, through a supportive legal and practical regulatory framework in line with international human rights standards; (b) access to international and regional human rights mechanisms and effective cooperation with independent national human rights institutions; (c) access to information; (d) special measures and resources targeting the most marginalized groups to ensure their integration and participation and the consideration of their voice among civil society actors; (e) opportunities for civil society to participate in decision-making processes; and (f) the provision of financial resources and stability, including through public subsidies.

115. States should also support legal empowerment programmes, ensuring their broad participation among a sufficiently large section of the population and their long-term impact, in order to have a transformative effect on attitudes and behaviour. This may include: (a) building partnerships among various actors, including (international) donors, government focal points and community leaders; (b) sustained financial and capacity support; and (c) the creation of mutually reinforcing networks among individuals and groups at the local, national and international levels.

Cultural and the individual spheres

116. The Special Rapporteur calls upon States to conceive educational reforms, cultural interventions, including memorialization, and archives as part of their non-recurrence policies. He urges States to focus more attention on these areas, and intends to pay more attention to them in the future, in cooperation with other special procedures.

117. He also calls upon States to consider the annexed set of general recommendations for truth commissions and archives as an important component of the work of the Human Rights Council on transitional justice.

118. States should ensure that history teaching aims at fostering critical thought, analytic learning and debate, in order to enable a comparative and multi-perspective approach, as well as a better understanding of the contemporary challenges of exclusion and violence.

119. States should also ensure that psychosocial support and trauma counselling are addressed as core components of transitional justice, emphasizing their central importance for repairing the social contract — i.e., the relationship between the State and the individual — and social cohesion — i.e., relationships of individuals with one another — after periods of protracted violence and/or oppression. The Special Rapporteur underscores that these twin goals are essential to offering victims and society the highest possible guarantees available that violations will not reoccur.

120. The Special Rapporteur calls upon States to build a sustainable culture of non-recurrence by ensuring that trauma counselling in transitional contexts not only focuses on assisting individuals and families with "daily problems", but also includes interventions to build on and strengthen the resilience and coping mechanisms of the communities and society at large. In this connection, trauma work should be linked to educational reform and education itself, for children, adolescents and adults.

121. He also calls upon States to develop further work on and support for psychosocial initiatives, both to relieve the immense suffering of victims and to help to put an end to cycles of violence. He highlights that to think that the burden of prevention can be carried by punitive measures alone is both to overestimate the capacities of criminal justice systems and to underestimate the importance of other types of intervention.

Annex

[English only]

Set of general recommendations for truth commissions and archives

Introduction

1. Many post-authoritarian and post-conflict societies are faced with enormous challenges in the preservation and disposition of records containing information on gross human rights violations and serious violations of international humanitarian law. In many cases, secrecy, national security concerns, and poor archival practice stand in the way of guaranteeing the right to know the truth.

2. Archivists have, over time, developed sophisticated technical expertise and knowledge on all relevant issues regarding archives, including preservation, accessibility, and management. However, there is a striking gap between technical archival expertise and practice. Policies and practices that fall short of international standards risk the loss of records containing an important part of a society's heritage and hence hamper the possibility of accessing documentary evidence and support for efforts to achieve truth and justice.

3. Indeed, archives are relevant and can make significant contributions to each of the pillars of transitional justice, not merely truth and justice. At the same time, transitional justice measures can contribute to a country's archival system. Beyond the fact that transitional justice measures generate records themselves, truth commissions, trials, reparations programs and other transitional justice initiatives can contribute to improving archival practice both by the way they implement relevant standards with respect to their own documents, and because some of them, particularly truth commissions, are in a good position to make comments and recommendations about archival reform in general.

4. That potential, however, has not been consistently realized. Even truth commissions, both in post-authoritarian and post-conflict settings, manifest a significant gap between expertise and actual practice. There is little consistency in the disposition of truth commission archives, in the regimes that govern subsequent access to them, and in the recommendations that truth commissions make concerning archival systems.

5. In the conviction that these gaps need to be addressed, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in his 2013 report to UN Human Rights Council on truth commissions (A/HRC/24/42) "calls for the development of international standards on archiving" for truth commissions. What follows is intended to contribute to the development of such standards. Part I contains recommendations *for* truth commissions pertaining to their own operations and the disposition of their archives, and Part II comprises recommendations that truth commissions *can make* regarding the establishment of national archival policies concerning

records that contain information about gross human rights violations and serious violations of international humanitarian law.[a]

6. As a general point, the Special Rapporteur would like to take the opportunity to reiterate the call on States to provide full support to truth-seeking mechanisms throughout their whole life-cycle, which includes access to records containing information on gross human rights violations and serious violations of international humanitarian law, in order for them to be able to effectively and independently implement their mandate.

I. Recommendations for truth commissions

In the context of their operations, truth commissions are encouraged to:

7. *Build* provisions for the eventual disposition of their records, guaranteeing both their safety and accessibility. This needs to be done in the early stages of planning their operations: a commission needs to decide who will be responsible for managing the records, where they will be stored in the short and long term, and how access to them will be controlled;

8. *Engage* archival expertise in making and implementing those provisions during the life of the truth commission, and in this context take advantage of national (National Archives and Archival Associations) and international assistance and advice (e.g. International Council on Archives, Archivists without Borders);

9. *Plan* to deposit their archives in the country where the violations occurred and the commission operates, preferably in existing national archives, duly taking into account considerations of the security, integrity and accessibility of the archives. New and specialized archives may need to be created until such time as the national archives are able to adequately handle records of truth commissions. In the event of the possible loss, mutilation, poor preservation or destruction of the records in the country of origin, truth commissions should keep a complete, scanned and/or digitalized copy of the records in a secure facility outside the country or consider temporary preservation in a secure repository in a second jurisdiction or with an international institution;

10. *Consider* criteria having to do with preservation, accessibility, and trustworthiness of the host institution in deciding on the adequate repository.[b]

11. *Stipulate* that the access policy of truth commission archives should maximize public accessibility, while respecting applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony. Access to truth commission archives may not be denied on grounds of national security or other grounds unless the restriction is in full compliance with international human rights law;

12. *Note* that maximizing future accessibility has an impact on many operations of a commission throughout its lifetime, including, for example, on the process of taking statements and other contact with victims and witnesses who should be advised that their

[a] Both sets of recommendations build on well-established definitions on the "right to know" and on "archives" as stipulated in, among other places, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity; see report of the independent expert Diane Orentlicher to update the Set of principles to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005.

[b] For example, ISO 16363 defines a practice for assessing the trustworthiness of digital repositories.

contributions to the commissions may be accessible in the future under specified conditions;

13. *Establish* guidelines for access to truth commission records, which shall take into account:

(a) General access rules, such as what was previously public should remain public; victims, families, investigative and prosecutorial authorities, as well as legal defense teams, should have unhindered access to information on their specific case; there should be a presumption of public access to all State information with only limited exceptions; a procedure to make effective the right of access should be established; whatever access rules are determined for various categories of potential users (for example, victims, legal representatives, journalists, academics, and members of the general public) should apply to all members of the given category without discrimination;

(b) Categorization of records enabling familiar distinctions between types of documents (e.g. reports of own investigations, records of own meetings, victims' testimonies, documents obtained from other institutions, organizations, or private persons etc.) that will allow for a differentiated approach in facilitating access, in accordance with general access rules, to each type of document/collection;

(c) The need for effective mechanisms of reference services, as well as new technological advances in managing archives;

14. *Develop*, with the support of national and international expertise and assistance, provisions and measures to secure and preserve national archives, including by building effective and sustainable record management and archival systems, which includes, i.a., secure and adequate premises and clear appraisal policies;

15. *Elaborate* policies concerning relevant records and archives of non-State actors, including private businesses, so as to maximize effective management and access of these records by the truth commission.

II. Possible recommendations by truth commissions

16. Regarding their recommendations on archives and the establishment of national archival policies that concern records containing information on gross human rights violations and serious violations of international humanitarian law, truth commissions are encouraged to:

17. *Address* the issue of reform of national archival legislation and institutions to encourage the establishment of modern, accessible, and reliable archives which are essential for the long-term preservation and use of records containing information on gross human rights violations and serious violations of international humanitarian law. Recommendations should include that reform efforts ought to be conducted with the participation of public institutions, civil society, and archival experts;

18. *Make* recommendations to preserve and actively use national archives, including archives of security services;

19. *Call for* independent oversight over the archives, including of archives of formerly repressive regimes;

20. *Recommend* the creation of archival laws, freedom of information legislation, data protection legislation and transparency requirements within other laws, which take into account the right to information, the right to know the truth, and the specificity of the records dealing with human rights violations and violations of international humanitarian law;

21. *Recommend* to the responsible authorities that they increase the capacity and where necessary the resources of State and local archival actors;

22. *Recommend* the provision by the State of information to the public on legal and practical requirements for access to archives;

23. *Promote* the establishment of comprehensive National Archival systems, including non-governmental records, especially those that are relevant to gross human rights violations and serious violations of international humanitarian law. Improvements in the regulation, disposition, protection and access to non-governmental archives (which does not involve the centralization of *all* records) will contribute to the establishment of such comprehensive systems, in accordance with international standards;

24. *Recommend* to the responsible authorities that they facilitate the work of civil society in the area of archives and ensure an enabling environment in this respect, in accordance with international standards;

25. *Reiterate* that access to archives, containing records with information on gross human rights violations and serious violations of international humanitarian law, may not be denied to the public on grounds of national security unless the restriction is in full compliance with international human rights law.